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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MANUEL PAINIA, Defendant and Appellant.	B215733 (Los Angeles County Super. Ct. No. YA073070)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Reversed.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Manuel Painia was convicted of inflicting corporal injury on a spouse or cohabitant. The trial court allowed the victim's preliminary hearing testimony to be read without a showing of due diligence by the prosecution that the witness was unavailable. Appellant contends that the trial court erroneously allowed the preliminary hearing testimony to be read, denying appellant the right to confront witnesses against him. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Naudia Johnson, mother of appellant's children, got off work at 9:00 p.m. on September 22, 2008. She waited at her work on Imperial Highway in Inglewood until 9:40 p.m. for appellant to pick her up from work. When appellant arrived, Johnson could tell he had been drinking, so she began driving. Johnson and appellant got into an argument about appellant's drinking and about their children. As the argument continued, appellant hit Johnson in the back of the head. Johnson slammed on the brakes, then continued driving. Appellant continued to hit Johnson on the right arm, which she was using to protect her face and to keep appellant from the steering wheel. Johnson pulled over, and appellant grabbed the keys from the ignition. Appellant then drove them to his cousin's house, hitting Johnson's face on the way.

When they arrived at the home of appellant's cousin, they continued fighting. They got out of the car, and Johnson approached the house to get her son, who was inside. Appellant hit Johnson in the back of the head again. Appellant's cousin brought Johnson's son out of the house and put him in the car. Johnson got back the keys to the car and left.

As soon as Johnson left, she drove to the police station. When she arrived, they took pictures of her injuries: a black eye, an injured lip, a bruised jaw, and bruises on the arm. A police officer reported her face was red and swollen, her lips were bruised and swollen, her shirt was torn, and there was blood on it. A paramedic treated her for her injuries. More pictures of the injuries were taken three days after the incident.

Appellant's cousin Marcus Lenoir testified that on the night of the incident, he went outside his house and saw Johnson and appellant arguing, with Johnson crying. Lenoir did not notice any injuries or ripped clothing.

Appellant testified that he had not been drinking before picking Johnson up from work. Appellant also testified that he did not hit Johnson or cause any of her injuries on the way back to his cousin's house.

Appellant was charged with inflicting corporal injury to a spouse or parent of his child (Pen. Code, § 273.5, subd. (a)), and with two prior convictions (Pen. Code, §§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i)).

At the preliminary hearing, Johnson appeared as a witness against the appellant and was cross-examined. After being held to answer, appellant pleaded not guilty, and a jury trial began. The prosecutor announced the People would proceed against appellant as a second strike case and not a third strike case.

Johnson failed to appear to testify at trial. Her preliminary hearing transcript was read in her absence.

A jury found appellant guilty of the crime of infliction of corporal injury to a child's parent and found one of the prior convictions true. The prosecutor dismissed the other prior conviction. Appellant was sentenced to four years (the upper term) in prison, doubled for a total of eight years because of the prior conviction.

On appeal, appellant claims the trial court erred in permitting Johnson's testimony from the transcript of the preliminary hearing to be read in court because the prosecutor failed to demonstrate due diligence in securing her presence at trial.

DISCUSSION

Appellant contends that the trial court incorrectly allowed Johnson's testimony from the preliminary hearing to be read in lieu of Johnson's giving testimony by not conducting a due diligence hearing, and the prosecutor did not demonstrate due diligence in securing Johnson's presence. We agree.

Johnson appeared at several pretrial hearings, but failed to appear for three pretrial hearings (on February 17, 2009, February 24, 2009, and March 16, 2009). Each time she

failed to appear, the court ordered a body attachment for her. When she thereafter appeared in court, the orders were quashed each time. Johnson failed to appear at trial on April 13, and the court ordered another body attachment for her. The prosecutor attempted to reach Johnson on her cell phone, but the voice mail box was full and the prosecutor was unable to leave a message. The prosecutor said a detective should be sent to Johnson's house to detain her. Johnson still did not appear on April 14, so Johnson was declared unavailable, and her testimony from the preliminary hearing was read to the jury.

Both the federal and state Constitutions guarantee a defendant the right to confront witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) Testimonial out-of-court statements are typically inadmissible as evidence, but if a witness is unavailable and has previously been cross-examined, that previous statement can be admissible. (*Crawford v. Washington* (2004) 541 U.S. 36, 59.) States have flexibility when determining rules for nontestimonial hearsay, but when dealing with testimonial evidence, the confrontation clause of the Constitution requires unavailability and cross-examination before prior testimony can be admitted as an exception to hearsay rules. (*Crawford v. Washington, supra*, 541 U.S. at p. 68.)

California allows prior testimony of an unavailable witness to be admitted under Evidence Code section 1291 if the prosecution used reasonable (or due) diligence to locate the unavailable witness. (Evid. Code, § 240, subd. (a)(5); *People v. Cromer* (2001) 24 Cal.4th 889, 892.) Whether there has been due diligence or not is a mixed question of law and fact, requiring independent or de novo review. (*People v. Cromer*, at pp. 893, 900.)

Due diligence has not been exercised if the prosecutor requested a bench warrant but did not attempt to serve it or locate the witness based on information available. (*People v. Enriquez* (1977) 19 Cal.3d 221, 236, overruled on another ground in *People v. Cromer, supra,* 24 Cal.4th at p. 901, fn. 3.) Due diligence has not been found when the attorney made a single call to the witness's former place of employment and several visits to the witness's address, and no friends, relatives, or coworkers were contacted to find

out the witness's possible locations. (*People v. Sanders* (1995) 11 Cal.4th 475, 524-525.) Due diligence has also not been found if the attorney waits until the day before the trial to locate a witness at the last known address and did not make efforts to keep track of the witness, despite knowing that the witness was a flight risk. (*People v. Avila* (2005) 131 Cal.App.4th 163, 169-170.)

Here, the prosecution presented no evidence of using due diligence to locate Johnson except to state that a detective should be sent to Johnson's home, and that she tried to call Johnson on her cell phone. When the prosecution stated that there should be a due diligence hearing, the judge simply declared Johnson to be an unavailable witness, instead of determining whether the prosecution had exercised due diligence. A bench warrant had been issued, but the prosecution offered no evidence a service had been attempted, either at Johnson's home or place of employment. The prosecution also offered no evidence that Johnson's family or friends had been contacted. Johnson had been known to be a flight risk, as she had not shown up to several of the pretrial hearings. Because there is no evidence supporting that the prosecution had exercised due diligence in locating Johnson, the court erred in allowing Johnson's prior testimony to be read to the jury.

Respondent claims that any error in allowing Johnson's preliminary hearing testimony to be read to the jury was harmless because of the testimony of Deputies Santos and Yamasaki. It must be shown beyond a reasonable doubt that admitting the transcript of a witness's testimony in lieu of appearing did not contribute to the verdict for the error to be harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) However, the prosecution relied heavily on the preliminary hearing testimony of Johnson in arguments to the jury. Johnson was the central witness against appellant because she was the victim and had reported the crime. Deputies Santos and Yamasaki only testified as to Johnson's appearance and what she had said to them. Because the prosecution relied so heavily on Johnson's preliminary hearing testimony, admitting the transcript of that testimony was not harmless.

DISPOSITION

The judgment is reversed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.